Supreme Court, U.S.
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No. 99-233

In The

Supreme Court of the United States

ALBERTA DESHAY, et al.,

Petitioners,

v.

BASTROP INDEPENDENT SCHOOL DISTRICT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a severely handicapped child, who is unable to care for or protect himself, "voluntarily" enrolled in a federally funded secondary school program, has fewer constitutional rights than a person confined in a prison or a mentally retarded person confined in a state school or hospital.

This question asks the Court to give meaning to the "shock the conscience" standard" [sic] for substantive due process claims set forth in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 112 S.Ct. 1061 (1992).

II. Whether a severely handicapped child, if he has rights comparable to a person confined in a prison or a mentally retarded person confined in a state school or hospital, including the right to bodily integrity, who is severely injured at a federally funded secondary school, and the acts leading to those injuries are in violation of the child's constitutional rights, should those acts be measured on the "totality of the circumstances", including acts before and after the child's initial injuries.

There is a difference in the Circuits as to the application of post-incident events to determine policy or custom. The Fifth Circuit under *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987), and as demonstrated in this case, is limiting such application to outrageous police conduct involving the wanton use of guns on hapless citizens who are killed, and will not be applied to life threatening injuries by governmental agents to helpless citizens who are in the custody of governmental agencies such as BISD. The First Circuit, on the other hand, has cited the *Grandstaff* decision in *Roma Construction Co. v. Arusso (sp.)*, 96 F.3d 566, paragraph 59,

QUESTIONS PRESENTED – Continued

(1st Cir. 1996) in support of the proposition that in a municipal setting "a fact finder could conclude that extortion of outsiders, businessmen, or developers, if proven, was 'the way things are done and have been done' in the Town." Such analysis is applicable to all the § 1983 related issues regarding Appellants' case, and if applied to the totality of the circumstances, the Supreme Court should reverse the decisions of the Courts below.

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BRIEF IN OPPOSITION

Respondents Bastrop Independent School District, Bastrop Special Education Cooperative, Paul H. Fleming, Verla Long, Margaret Ryan, and unknown employees of the Bastrop Independent School District and Special Education Cooperative, in their official capacities, respectfully request that Petitioner's Writ of Certiorari be denied, and that this Court affirm the judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the United States District Court for the Western District of Texas, Austin Division, granting Respondent's Motion for Summary Judgment.

STATEMENT OF THE CASE

With the exception of petitioner's occasional inflammatory characterizations,[1] respondents do not dispute petitioner's statement of the case, as it accurately outlines the procedure thus far and the claims asserted by the petitioner in the lower courts.

[1] Characterizations such as "obvious" discomfort; "potentially life threatening" compound fractures; "conspiracy to hide" the injury; the board gave "complete approval" of the acts of personnel; and so on. Respondents additionally dispute that the record reflects any admission by Nurse Ryan that emergency care would have been summoned "had Kevin been able to communicate." The Record, Ryan's Deposition at 146.

ARGUMENT AND REASONS FOR DENYING WRIT

I. No compelling reason exists for granting certiorari; *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) is determinative of the issue of "shock the conscience."

Petitioner asks the United States Supreme Court to accept a petition for certiorari to "give meaning to the 'shock the conscience' standard" for substantive due process claims. Petition for Writ of Certiorari, p. 8 (hereafter "Petition.") "In the wake of *Collins*", Petitioner explains, referring to *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992), "lower federal and state courts have struggled" with this substantive due process issue. *Id.* While Respondents dispute that there has been any matter of conflict between the lower circuits (certainly there have been no two circuits differing on a similar set of facts),[2] the issue is nonetheless resolved by the Supreme Court's

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[2] It appears as if petitioner has simply cited any and all cases that reference the phrase "shock the conscience" without regard to their application. For instance, petitioner cites to a case involving a *procedural* due process violation, *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (Jan. 17, 1995), a case that has been *reversed* by this Court, *Branch v. Turner*, 37 F.3d 371 (8th Cir. 1994), *rev'd sub nom. Goeke v. Branch*, 514 U.S. 115 (1995) (per curiam), a case alleging a substantive due process violation based on economic damages, *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133 (2nd Cir. 1994), public housing funds, *LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097 (6th Cir. 1995), tort violations, *Skinner v. City of Miami, Fla.*, 62 F.3d 344 (11th Cir. 1995), *cert. denied*, 520 U.S. 1165 (Apr. 14, 1997), and other cases that do not involve a pure substantive due process claim; e.g., *Leffall v. Dallas Independent School District*, 28 F.3d 521 (5th Cir. 1994).

pronouncement six years after *Collins* in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), clarifying and solidifying application of the "shock the conscience" standard to Section 1983 substantive due process causes of action.

The Supreme Court in *Lewis* seized the opportunity to remind its constituents that the Fourteenth Amendment is not a vehicle for tort reprieve; "[w]e have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *Lewis*, 523 U.S. 833 at 842. Rather, substantive due process claims are supported by "conduct intended to injure." *Id.* This intentional behavior is what is "most likely to rise to the conscience-shocking level," thereby illustrating the requisite arbitrary action violative of the Fourteenth Amendment. *Id.*

The facts of *Lewis* are textbook Section 1983: high speed police chase resulting in death. Similar to many other Section 1983 cases, the facts of *Lewis* present more than mere negligence, but less than an intentional act. Certainly, there have been some instances where deliberate indifference by the state actor was sufficient conscience-shocking behavior to invoke Section 1983 liability. *See City of Revere v. Massachusetts Gen. Hospital*, 463 U.S. 239, 244 (1983); cf. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). (Deliberate indifference to the medical needs of pre-trial detainees). However, whether the requisite level of "shock the conscience" is met when the mental state of intent is not present, is a matter to be determined on a case-by-case basis. There is no "mechanical application," explained this Court. Rather, lower courts are to examine

the context and circumstances of the injury before assigning a "shock the conscience" label to every act of deliberate indifference. In *Lewis*, because the police officer's intent was to do his job, not to cause harm or kill, no cause of action existed. "[O]nly a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the shocks-the-conscience test." *Lewis*, 523 U.S. 833.

Here, Petitioner's substantive due process cause of action revolves around a claim of "custom of ignoring school policy," which, according to Petitioner, has created "an environment in which special education children are at risk of receiving grossly inadequate care." Petition, p. 7. Assuming for purposes of this appeal that Kevin's legs were broken at school,[3] the summary judgment evidence simply does not support a finding that the injury was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. 833 at 834, n. 8. Certainly, there was no "purpose to cause harm unrelated to [the administration of therapy.]" *Lewis*, 523 U.S. 833 at 840. The act of breaking Kevin's legs is negligence, at most. "Liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* at 842.

The standard set out in *Collins v. City of Harker Heights* and later clarified by this Court in *County of Sacramento v. Lewis* has been applied by the circuit courts, without difficulty, to the myriad of fact situations involved in Section 1983 litigation; *see, e.g., Wilkinson v. Russell*, No. 98-7663, 1999 WL 395990 (2nd Cir. 1999);

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[3] The summary judgment evidence on this point is speculative support for Petitioner's theory.

Davis v. Township of Hillside, No. 98-6176, 1999 WL 639927 (N.J. 1999); *Hawkins v. Freeman*, 166 F.3d 267 (4th Cir. 1999) (opinion vacated upon granting of rehearing *en banc*); *Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999); *S.S. v. McMullen*, No. 98-1732, 1999 WL 512176, at *7-*8 (8th Cir. 1999) ("Lewis explored the continuum of 'deliberately indifferent' conduct and held that deliberate indifference that shocks (the conscience) in one environment may not be so patently egregious in another"); *Singleton v. Cecil*, 176 F.3d 419 (8th Cir. 1999) (*en banc*); *Taylor v. City and County of San Francisco*, 166 F.3d 344 (9th Cir. 1999); *Torres v. Bonilla*, No. 97-55893, 1999 WL 362974 (9th Cir. 1999); *Onossian v. Block*, 175 F.3d 1169 (9th Cir. 1999); *White v. Lemacks*, No. 98-9513, 1999 WL 597409 (11th Cir. 1999); *McElligott v. Foley*, No. 98-3451, 1999 WL 565471 (11th Cir. 1999); *compare Saenz v. Heldenfels Brothers, Inc.*, No. 98-40902, 1999 WL 556440, at *3 (5th Cir. 1999) (Defendant's "decision, while imprudent and ultimately tragic, was not sufficiently willful and targeted toward specific harm to remove the case into the domain of constitutional law.") *with Morris v. Dearborne*, No. 98-40488, at *7-*8 (5th Cir. 1999) ("Applying *Lewis* . . . to the case at bar, we conclude that a teacher's fabrication of sexual abuse against a student's father shocks the contemporary conscience"); and likewise by the trial courts. *See, e.g., Peters v. Houston*, No. 98-1580, 1999 WL 554581 (E.D. Pa. 1999); *Schieber v. City of Philadelphia*, No. 98-5648, 1999 WL 482310 (E.D. Pa. 1999); *Weaver v. Tipton County, Tenn.*, 41 F. Supp. 2d 779 (W.D. Tenn. 1999); *Feist v. Simonson*, 36 F. Supp. 2d 1136 (D. Minn. 1999); *Babbar v. Ebadi*, 36 F. Supp. 2d 1269 (D. Ka. 1998); *El Dia, Inc. v. Rossello*, 30 F. Supp. 2d 160 (D. Puerto Rico 1998).

No compelling reason exists to grant the Petition for Certiorari.

II. The United States Supreme Court denied certiorari in *Grandstaff v. City of Borger*; there is no compelling reason for this Court to re-visit the issue of post-incident events and Section 1983 liability.

Petitioner asserts that there is a "difference in the circuits as to the application of post-incident events to determine policy or custom." Petition, p. 14. The difference, Petitioner contends, lies in the Fifth Circuit's refusal to find custom outside the arena of police misconduct. Specifically, Petitioner states that the Fifth Circuit, "as demonstrated in this case," is "limiting such application to outrageous police conduct involving the wanton use of guns on hapless citizens who are killed." *Id.* The Fifth Circuit, of course, has not – in this case or any other – limited its application of post-incident events determining policy or custom to police misconduct. Rather, *Grandstaff* applies in all instances when there is "subsequent acceptance" by a policy maker to "gross abuse." *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987). That acceptance, explained the court, proves a preexisting disposition and, hence, policy or custom. The Fifth Circuit has never said that the "gross abuse" must occur in the police setting; those just happened to be the facts of *Grandstaff*.

Grandstaff v. City of Borger involved a cause of action brought by the estate of James Grandstaff against the City of Borger and its police officers under Texas law and Section 1983 after the officers mistook Mr. Grandstaff for

a fugitive and killed him. Although there was no evidence of prior misconduct on the part of the police force or prior knowledge and state of mind of the police chief, the Fifth Circuit Court of Appeals nonetheless found the existence of a policy of indifference to human life at the time of the fatal shooting. In doing so, the panel cited to the number of abusive acts in one night by the officers and the corresponding reaction of the police chief – no reprimands, no discharges, no admissions of error and no policy changes. The Court of Appeals concluded, "[t]his reaction to so gross an abuse of the use of deadly weapons says more about the existing disposition of the City's policymaker than would a dozen incidents where individual officers employed excessive force. The policymaker's disposition, his policy on the use of deadly force, after August 11 was evidence of his disposition prior to August 11." *Id.* at 171.

Since *Grandstaff,* the Fifth Circuit has had opportunities to find policy or custom when looking at "post-incident" behavior of policymakers in a variety of cases, *including those involving police misconduct,* and has declined to do so. The cases that follow *Grandstaff* emphasize that the holding in *Grandstaff* is limited to its highly peculiar set of facts and its analysis can be applied only to equally extreme factual situations. *See Coon v. Ledbetter,* 780 F.2d 1158, 1161 (5th Cir.1986); *Stokes v. Bullins,* 844 F.2d 269, 274 n.8 (5th Cir.1988); *Palmer v. City of San Antonio,* 810 F.2d 514, 516 (5th Cir.1987). The opinion most akin to this fact pattern is *Thompkins v. Belt,* 828 F.2d 298 (5th Cir.1987), a case involving the denial of medical treatment to an inmate. There, the plaintiff attempted to hold the sheriff liable under a theory of supervisory

liability. When ruling in favor of the sheriff policymaker, the *Thompkins* Court recognized that, at most, *Grandstaff* stands for the proposition that a policymaker can be liable in the absence of an overt act only if his, her or its policy *is the moving force* behind the constitutional violation. 828 F.2d at 304.[4] Finding that not to be the case, the panel relied upon the fact that the plaintiff, "adduced no evidence whatever that the jail's treatment system had ever actually failed to deliver necessary and appropriate medical care to any other inmate, or that the [policymaker] was otherwise actually informed or consciously believed that the policy would expose prisoners to substantial risk of significantly unmet serious medical needs. . . . " *Id.* at 305. *Thompkins* reiterated that "the existence of a constitutionally deficient policy cannot be inferred from a single wrongful act." *Id.* at 305.

Similarly, here, there is no evidence that any policy led to the breaking of Kevin's legs. The policy or custom which Petitioner chronicles in his brief to this Court (and all lower courts) is to do nothing *after an injury*. This, again, is a *subsequent act*, or failure to act, on the part of BISD and is not the moving force behind the injury. Even taken as true, the BISD officials' hypothetical knowledge that their failure to rush Kevin to the hospital would be condoned by the board of trustees did not *cause Kevin's legs to be broken*. Petitioner's argument is void of logic. (Compare *Grandstaff*, "[w]here police officers know at the time they act that their use of deadly force in conscious

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[4] A position we maintain is consistent with, and indeed, mandated by this Court's decision in *Board of County Commissioners of Bryan County, Okl. v. Brown*, 520 U.S. 397 (1997).

disregard of the rights and safety of innocent third parties will meet with approval of city policymakers, the affirmative link/moving force requirement is satisfied." 767 F.2d at 170.)

The fact that the First Circuit in *Roma Construction Co. v. aRusso*, 96 F.3d 566 (1st Cir. 1996), concluded that a trier of fact could infer an unconstitutional policy or custom from subsequent acts is not at all inconsistent with *Grandstaff*,[5] but rather follows *Grandstaff*. The importance of *Roma*, if anything, is that (also consistent with *Grandstaff*) the court emphasizes that it is not enough to simply establish policy or custom; the policy must be the moving force behind the violation. The policy must *cause the injury*. *Roma Construction Co. v. aRusso*, 96 F.3d at 575. Petitioner, here, would have faced the same end result in the First Circuit as he did in the Fifth. No compelling reason exists to grant certiorari.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit in this case is consistent with other circuit's application of Section 1983 and this Court's pronouncement in *County of Sacramento v. Lewis*. The issue of governmental liability for substantive due process claims, even application of post-incident events for purposes of

[5] Of course, the *Roma* court did not apply *Grandstaff* to any particular set of facts, but simply referenced the pleadings (which the reader is not privy) as sufficient to state a cause of action.

establishing policy or custom, is well settled. There exists no compelling reasons for granting the petition for writ of certiorari. Respondent respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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